No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASGROW SEED COMPANY,
Petitioner,
v.
DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICI CURIAE OF RURAL ADVANCEMENT FOUNDATION INTERNATIONAL, FRIENDS OF THE EARTH, SEED SAVERS EXCHANGE, NATIVE SEEDS/SEARCH, CENTER FOR RURAL AFFAIRS, ABUNDANT LIFE SEED FOUNDATION, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, MINNESOTA SAFE FOOD LINK, PESTICIDE ACTION NETWORK NORTH AMERICA REGIONAL CENTER, AND WASHINGTON BIOTECHNOLOGY ACTION COUNCIL IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA or Act), 7 U.S.C. §§ 2321-2581, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. The PVPA defines certain actions as infringements on the breeder's rights. 7 U.S.C. § 2541. Those rights are enforceable by a civil action for infringement in the federal district court. 7 U.S.C. § 2561. The PVPA exempts from infringement liability the saving of seed for use in replanting and the sale of saved seed. 7 U.S.C. § 2543. The PVPA also provides that farmers whose primary farming occupation is the growing of crops for other than reproductive purposes may market and sell saved seed to other similarly situated farmers. The Court of Appeals for the Federal Circuit held that sales of saved seed between farmers do not constitute an infringement as long as both the selling and buying farmer utilize at least one-half of their crop from a protected variety for consumption or other nonreproductive purposes. The Court also ruled that the notice provision of 7 U.S.C. § 2541(6) does not apply to sales of saved seed between qualifying farmers. The questions presented are:

1. Whether 7 U.S.C. § 2543 imposes any limitation on the amount of seed a farmer may save or the amount of saved seed which may be sold by a farmer whose primary farming occupation is the growing of crops for sale for other than productive purposes to another farmer?

2. Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed is a protected variety?

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The Rural Advancement Foundation International, Friends of the Earth, Seed Savers Exchange, Native Seeds/SEARCH, Center for Rural Affairs, Abundant Life Seed Foundation, Institute for Agriculture and Trade Policy, Minnesota Safe Food Link, Pesticide Action Net-

work North America Regional Center, and Washington Biotechnology Action Council respectfully submit this brief as *amici curiae* in support of the Respondents. Consent of the parties has been lodged with the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The *amici* are public interest and membership organizations with an interest in farm environmental issues. They are particularly concerned about the effect that the increasing regulation of seed germplasm, in this country and abroad, has on maintaining a vital and diverse agricultural sector and about the potential disastrous effects of modifying the system of farmer-based crop development which has been the centerpiece of agriculture in the civilized era.

The Rural Advancement Foundation International-USA ("RAFI") is a private, non-profit organization which is dedicated to the preservation of family farms, the conservation and sustainable use of argicultural biodiversity, and the socially responsible use of new technologies. RAFI is concerned with the loss of genetic diversity in agriculture, and with the impact of plant intellectual property rights on U.S. agriculture and world food security.

Friends of the Earth (FOE) is a national environmental membership group. FOE is an affiliate of Friends of the Earth, International, which is active in fifty-two countries. FOE has pioneered investigations of the effect of biotechnology on the environment and agriculture.

Seed Savers Exchange (SSE) is a non-profit grassroots organization whose 7,000 members are rescuing endangered vegetable and fruit varieties from extinction. SSE's headquarters is at Heritage Farm near Decorah, Iowa, where several unique collections are permanently maintained and displayed, including 13,000 endangered vegetable varieties, 700 old-time apples and 200 hardy grapes.

Native Seeds/SEARCH is a non-profit organization which works to conserve the traditional crops, seeds, and

farming methods that have sustained native peoples throughout the U.S. Southwest and Northwest Mexico. Based in Tucson, Arizona, Native Seeds/SEARCH promotes the use of these ancient crops and their wild relatives by gathering, safeguarding and distributing their seeds, while sharing benefits with traditional communities. Through research, training, and community education, Native Seeds/SEARCH works to protect biodiversity.

The Center for Rural Affairs is an independent, non-profit organization based in Walthill, Nebraska which was formed by rural Nebraskans concerned about the role of public policy in the decline of family farms and rural communities. The Center's purpose is to provoke public thought about social, economic, and environmental issues affecting rural America.

The Abundant Life Seed Foundation is a non-profit corporation organized under the laws of the State of Washington whose purpose is to preserve genetic diversity and sustainable agriculture through acquiring, propagating and preserving native and naturalized seed, with specific emphasis on those species not commercially available, providing information on plant and seed propagation, and aiding in the preservation of native and naturalized plants through cultivation.

The Institute for Agriculture and Trade Policy is a non-profit research and education organization whose mission is to foster economically and environmentally sustainable communities and regions through sound agriculture and trade policy.

Minnesota Safe Food Link is a coalition of farmer and consumer organizations united for safe food and fair farm policies. Through research, public education and community outreach, Minnesota Safe Food Link is working to unite the values and mutual interests that exist between farmers and consumers regarding the issues of food safety and fair family farm policies.

Pesticide Action Network North America Regional Center (PANNA) is a non-profit organization which promotes replacing pesticides with ecologically sound pest management solutions. PANNA defends workers' and consumers' rights to health and environmental quality, and conducts campaigns to expand sustainable agriculture and reduce pesticide use.

The Washington Biotechnology Action Council (WASH-BAC) is composed of Washington state citizens active in environmental, public health, labor, farm and social justice issues. WASH-BAC is devoted to public education and citizen participation in the development of biotechnologies at the local, state, national and international levels.

SUMMARY OF ARGUMENT

I. The PVPA imposes no quantitative limit on the amount of seed a person may save from "seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." 7 U.S.C. § 2543. The statute clearly states that such a person may "use such saved seed in the production of a crop on his farm, or for sale as provided in this section." The right to save seed is subject only to the limitations imposed by Sections 2541(3) and 2541(4). Section 2541(3) prohibits sexual multiplication as a step in marketing a protected variety. However, logic dictates that no marketing can exist where the person growing the seed simply saves it. Section 2541(4), although not relevant to this case, prohibits using the seed to produce a hybrid or different variety.

This interpretation squares with the unassailable fact that there are no words of quantitative limitation anywhere in Section 2543. It also reflects the only legislative comment on Section 111 of S. 3070, which was enacted without change as 7 U.S.C. 2543. Both the House and Senate reports accompanying passage of S. 3070 contain identical Section-by-Section Explanations which state that the Section authorizes a farmer "to save seed from

such crop for future use or planting on the farm." H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). Neither report has any statement which, expressly or implicitly, indicates any limitation of the right to save seed, nor any indication that Section 2543 is a "narrow exception."

The right of a farmer to sell seed to another farmer, which is the central issue in this case, is also free from quantitative limitation. All seed which can be saved may also be sold, even though marketing. Section 2543 contains a proviso which removes the restriction on marketing for sales between farmers whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes. The argument that Section 2541(3) somehow limits the amount of seed which may be saved and therefore limits the amount of seed which may be sold by a farmer who is specifically exempt from Section 2541(3) makes no sense.

II. The Court of Appeals determined that the quantitative limitation on the amount of saved seed of a specific variety which may be sold in a farmer-to-farmer transaction is fifty percent of the crop raised by the selling farmer from the seed of that variety. The statute removes the prohibition against marketing on sales between persons "whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes." The Federal Circuit determined that this qualification should be read on a crop-by-crop basis. The Federal Circuit's transformation of a test based on "primary farming occupation" to one based on "sells less than half of a specific crop" has no support in the statute.

III. The Federal Circuit was correct in holding that a sale under Section 2543 is exempt from the requirement for notice found in Section 2541(6). Section 2543 specifically exempts sales, including farmer-to-farmer sales, from Section 2541(6). Whatever policy arguments might

support imposition of a notice requirement on "brown bagging" are best addressed to Congress.

IV. Any further limitation on the right to save seed or the right of farmers to sell and exchange saved seed will contribute to the alarming trend of depletion in the genetic germplasm available for growing crops. The vast majority of successful and disease-resistant crops have been, and continue to be, developed in the field and not in seed breeding stations. A flourishing and profitable seed industry existed before the passage of the PVPA, without patent-like protection, and will continue to exist, even if the right to save seed is preserved.

ARGUMENT

This case presents a challenge to the right of farmers to save, use and sell seeds harvested from crops they have grown through dint of their toil, at their expense, and on their lands. The right being attacked has existed virtually unfettered since the dawn of civilization. The Right To Save Seed is codified at 7 U.S.C. § 2543, which contains no quantitative limitation of the farmer's right to save and use seed and his or her right to sell and market such seed to other farmers.

The Petitioner, a multinational seed conglomerate whose inventory consists largely of seed patents developed by others, has mounted a vigorous campaign to end the practice known as "brown bagging" in which farmers sell saved seed to other farmers. It is clear that the Petitioner believed it could achieve its goal of stopping such sales simply by forcing farmers engaged in "brown bagging" to endure the costs of litigation. Having lost in the first case contested by a family farmer who chose to do battle, the Petitioner now comes before this Court and asks it to ignore the language of the statute and eviscerate not only the farmer's right to sell seed, but also the right to save seed and use it on one's own farm. The Petitioner's arguments for reading a complex limitation on saving seed into the statute have no merit.

I. THE RIGHT TO SAVE SEED IS EXPRESSED IN CLEAR AND UNAMBIGUOUS TERMS AND IS NOT SUBJECT TO ANY QUALIFICATION SUCH AS THAT URGED BY PETITIONER

Viewing the PVPA through the prism of self-interest, which it equates with the "purpose" of the statute, Petitioner argues that the language of the statute should give way to an interpretation based on what Petitioner wished the statute said. However impassioned the argument of Petitioner and its trade association *amici*, the Court should resist Petitioner's proposed rewrite of the statute under the guise of statutory interpretation. Resort to the form of statutory construction urged here would render the legislative process meaningless. Statutes are the product of compromise and the tug and pull of competing interests. While Congress may espouse numerous lofty and laudable goals—the elimination of poverty and disease, the advancement of science, protection of the environment and the like—it enacts specific provisions, not goals.[1] No bill ever states "This is a modestly important matter to which we have devoted some attention and while we want to achieve certain goals, we are not prepared to do much to reach them." But this is exactly what much, if not most, legislation does.

In resolving a dispute over the meaning of a statute "[i]t is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) *quoting Blue Chip Stamps v. Manor Drug Stores*,

[1] The much-awaited Man from Mars, reading legislative preambles and committee reports, might be puzzled to learn that the fostering of a domestic bee-keeping industry, the preservation of helium supplies, and the naming of weeks and months in honor of vegetables and obscure local politicians bear the same importance as national defense or finding a cure for cancer. What he would make of the many legislative encomiums to reducing the deficit which are attached to appropriations measures manifestly increasing it is open to question.

421 U.S. 723, 756 (1975) (POWELL, J., concurring). And if the language of the statute is clear, this is "where the inquiry should end." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The plain language should always govern, except in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). There is no such conflict in this case; even giving full effect to the farmer's right to sell saved seed, the statute promotes the seed breeding industry and limits the effects of farmer sales.[2]

The Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321 *et seq.*, establishes certain protections for a plant breeder who develops a novel variety of a sexually reproduced plant [3] and receives a certificate of protection from the Plant Variety Protection Office of the Department of Agriculture. 7 U.S.C. § 2483. A certificate of plant variety protection covers "seeds, transplants, and plants" of the novel variety. 7 U.S.C. § 2401(a).

Only two sections of the PVPA are relevant to the present dispute. Section 111 of the Act, 7 U.S.C. § 2541, PL 91-577, Title III, § 111, December 24, 1970, 84 Stat. 1554, establishes protection of the rights given to proprietors of a certificate of plant variety protection by defining eight acts of infringement: (1) selling the protected variety; (2) importing or exporting the protected variety;

[2] As the Federal Circuit noted below, a number of important restrictions remain on saved seed which has been sold by a farmer pursuant to 7 U.S.C. 2543. The most important of these is that the farmer who buys the seed can neither save nor sell it. *Asgrow v. Winterboer*, 982 F.2d 486, 490 (Fed. Cir. 1992).

[3] Sexually reproduced plants are those produced from seed. 7 U.S.C. § 2401(f). Plants reproduced by asexual methods, such as grafting, budding or cutting, are provided patent protection under U.S. patent law by the Plant Patent Act, 35 U.S.C. §§ 161-164, Act of May 23, 1930, ch. 312, 46 Stat. 376.

(3) sexually multiplying the protected variety as a step in marketing it for growing purposes; (4) using the protected variety to produce a hybrid; (5) using seed which has been labelled "propagation prohibited" to produce the protected variety; (6) dispensing the protected variety without notice that it is a protected variety; (7) performing any of the former in which the protected variety is multiplied asexually; and (8) inducing any of the former. The "patent-like" protection given to holders of certificates of plant variety protection issued pursuant to 7 U.S.C. § 2483 consists of the ability to bring an infringement action under 7 U.S.C. § 2561.

Almost immediately following Section 111 is Section 113, 7 U.S.C. § 2543, which establishes both the right to save seed and the crop exemption.[4] Section 113, PL 91-577, Title III, § 113, December 24, 1970, 84 Stat. 1555:

> § 2543. Right to save seed; crop exemption
>
> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of Section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop on his farm, or for sale as provided in this section: *Provided*, That without regard to the provision of Section 2541(3) of this title, it shall

[4] Because 7 U.S.C. § 2543 establishes, even according to the Petitioner, some sort of exemption to the infringement provisions of 7 U.S.C. § 2541, cases such as *Hallstrom v. Tillanhook County*, 493 U.S. 20 (1989), cited by Petitioner are of questionable relevance. *Hallstrom* involved an attempt to create an exception to a statutory provision where the statute "contains no exception applicable to petitioner's situation." *Id.* at 27. Here, there is no attempt to create, by implication, an exemption to the statute construed. Rather, the task is to determine the contours of an exemption whose existence is conceded by all.

> not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale be in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

The Federal Circuit held that Section 2543 placed no quantitative limitation on the right of farmers to save seed. It interpreted the statutory limitation on sale of seed on a crop-by-crop basis. Petitioner argues that the right to save seed is limited to the amount of seed needed to plant the next year's crop, and that the right to sell seed is similarly limited to the amount which can be saved.

Neither of these approaches is correct, although that of the Federal Circuit is far closer to the mark. The right to save seed is not limited by the statute. The right of a farmer to market seed for reproductive purposes is limited, as stated in the statute, to transactions between farmers whose primary farming occupation is the growing of crops for sale for other than reproductive purposes. The crop-by-crop limitation has no basis in law: the eligibility of both the farmer-seller and a farmer-buyer is based on whether, taken as a whole, they are in the business of selling crops or the business of selling seed.

A. The Right To Save Seed And The Farmer's Exemption Allowing Sales Of Saved Seed Between Farmers Are Not Inconsistent With The Intent And Purposes Of The PVPA

The Petitioner asks this Court to enter the legislative thicket and gut the farmer's exemption by arguing that a "proper reading" will "avoid attributing absurd results to Congress." Petitioner's Br. at 17. Petitioner then asks the Court to insert, into a section designed to benefit farmers, a lengthy and complex quantitative limitation on the right to save seed which does not appear in either the language of the Act or its legislative history. As this Court has stated, "[i]f the statutory language is unambiguous, in the absence of 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *U.S. v. Turkette*, 452 U.S. 576, 581 (1981) *quoting Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Cases in which the Court exercises the extraordinary method of statutory construction urged by the Petitioner are rare. In *Ron Pair*, the Court analyzed two instances in which it had effectively utilized such construction to invalidate the statutory language by importing a lengthy gloss, *Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) and *Kelly v. Robinson*, 479 U.S. 36 (1986). The Court noted that these cases had certain significant similarities:

> Both decisions concerned statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in conflict with state or federal laws of great importance.

Ron Pair, 489 U.S. at 245. No such conflict with other law is present here.

By ceaseless repetition, Petitioner and the *amici* hope to convince this Court that the language of Section 2543,

which provides the right to save and sell seed without quantitative limitations, is inconsistent with the purposes of the Act unless a quantitative limitation is added or otherwise read into that language. As this Court has recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Associates,* 113 S. Ct. 2063, 2071 (1993). While the construction of Section 2543 urged by Petitioner might further the ultimate policy objectives of PVPA, as viewed by the Petitioner, this fact does not justify incorporation of that policy into law over inconsistent statutory language. "No legislation pursues its purposes at all costs." *Rodriguez v. United States,* 480 U.S. 522, 525-26 (1987).

The evidence is overwhelming that Congress did not intend to pursue the goals of the plant breeding industry at all costs. Congress refused to extend to the breeders of sexually reproduced plants the patent protection afforded breeders of asexually reproduced plants by the Plant Patent Act, codified at 35 U.S.C. §§ 161-164. When the PVPA was initially passed, it excluded from coverage six of the most popular and, presumably, most profitable species. 7 U.S.C. § 2583 (repealed). Congress also failed to enact the languge contained in Section 112 of H.R. 13631, which would have expressly limited the farmer's right to save seed to the amount needed to grow crops for his or her own use, and which would have substituted the language now found in the statute. Lastly, although the United States became a signatory on March 19, 1991, the Senate has thus far refused to ratify the International Convention for the Protection of New Varieties of Plants (UPOV), which would limit the right to save seed along the lines urged by the Petitioner.

As will be discussed at some length in Section IV, *infra*, the saving of seed and the swapping, sale or transfer of seed between farmers has been an integral part of our

agricultural development. Early drafts of the PVPA would have eliminated this right totally; the final legislation did not. This fact is an essential component of any determination of legislative intent: "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia University Hospitals, Inc. v. Casey,* 111 S. Ct. 1138, 1147 (1991). The PVPA attempts to balance the rights of breeders with those of farmers, other growers of plants, and consumers. The balance should not be altered based on assertions of legislative intent, as "deciding what competing values will or will not be sacrificed through achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez,* 480 U.S. at 526.

Whatever the Court or the litigants may think about the wisdom of extending or contracting the farmer's exemption is beside the point; the purpose of judicial review of statutory meaning is to "apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 126 (1989). Any examination of legislative intent must not fall into an artificial examination of only the purported overall purpose of the statute, without giving proper deference to the purpose of the specific provision which is being interpreted. *Women Involved In Farm Economics v. U.S.D.A.,* 876 F.2d 994, 1002 (2nd Cir. 1989).

B. There Is No Statutory Limitation On The Amount Of Seed Which A Qualified Person May Save

The first sentence of Section 2543 consists of two parts, an opening clause followed by a proviso, each of which provides exemptions from liability for infringement under 7 U.S.C. § 2541. The opening clause gives a person who has produced seed from seed lawfully purchased

from a certificate holder (or descended from such seed) exemptions from all subsections of Section 2541, except for subsections (3) and (4):

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of Section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop on his farm, or for sale as provided in this section . . .

7 U.S.C. § 2543. This language is the source of the right to save seed.

While perhaps ungainly, the opening clause is not ambiguous. None of the prohibitions of Seciton 2541, except for subsections (3) and (4), apply to any person, whether a farmer, a suburban gardener, or an agribusiness conglomerate, who (1) has bought seed from the owner of the variety; (2) has produced new seed from a crop grown by him from the seed obtained from the certificate holder or descended from seed obtained from the certificate holder; and (3) is saving the produced seed. That person may do two things with the saved seed: "use such saved seed in the production of a crop on his farm" or "use such saved seed . . . for sale as provided in this section." These rights—to use seed on the farm or to sell it—are subject only to subsections (3) and (4) of Section 2541. Thus, the grower can save seed so long as he or she is not violating Section 2541(3) or (4). Subsection (3) prohibits sexual multiplication as a step in marketing, while subsection (4) prohibits use of the protected variety in producing a hybrid. Neither subsection places any quantitative limit on the amount of seed which may be saved. Nor, interestingly, do they place any limit on the amount of seed which may be sold, except that

marketing remains prohibited because Section 2541(3) applies to sales of saved seed.[5]

In contrast to this straightforward reading of the opening clause of Section 2543, Petitioner finds hidden and precise meanings submerged in its depths. Petitioner argues that placing an emphasis on the words "[e]xcept to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title" makes it "clear that the amount of PVPA seed that can be saved and sold as seed by the farmer is limited to precisely what Asgrow contends Congress provided in the statute." Petitioner's Br. at 19. The Petitioner goes on to state that the infringement provision of Section 2541(3) provides a "specific quantitative limit on the amount of PVPA seed that can be sold" which is "the portion of the farmer's crop which was sexually multiplied not as a step in marketing the novel variety, but

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[5] The term "marketing" found in Section 2541(3) is not defined in the PVPA. Its definition is not necessary for the resolution of this case because the Winterboers were engaging in a farmer-to-farmer sale, to which the prohibition on marketing does not apply.

However, it is obvious that by lifting the prohibition on sales in the opening clause while retaining the prohibition on marketing, Congress must have intended that certain types of sales did not constitute marketing and that such sales would be allowed, even if not between farmers whose primary farming occupation is the growing of crops for sale for other than reproductive purposes.

An example of the kind of sale or transfer which might be allowed under the opening clause, even subject to the limitation of Section 2541(3), would be the transfer of saved seed incident to the sale of a farm. Other sales or transfers which do not involve marketing include: transfer on inheritance, foreclosure, and transfer to a trustee in bankruptcy. Sales of saved seed by ranchers, dairy farmers and others whose primary farming occupation is not the growing of crops might also be allowed, as long as it was not accompanied by marketing.

only for future use as seed on the farmer's own farm." Petitioner's Br. at 21.[6]

The flaw in this approach[7] is that Section 2541(3) can not operate to place any limitation on "saving seed." The farmer may save whatever amount of seed he or she wishes for use on his farm—for more than one year, or for more acreage (either by choosing to plant more on existing land or acquiring additional land)—without violating Section 2541(3), because he is not "marketing" the product by saving it.

The dispute which both the Petitioner and the United States have with the Federal Circuit over whether "marketing" and "sales" are distinct or overlapping has no relevance to saving seed. Nevertheless, the assertion that "sales" equal "marketing" seems to fly in the face of the statute itself, which establishes separate prohibitions on the selling of a protected variety, Section 2541(1), and the marketing of a protected variety, Section 2541(3). While both the Petitioner and the United States resort to dictionaries to argue for the broadest possible interpretation of "marketing" as including "sale,"[8] none of the

[6] The United States adds an interesting gloss on this by stating that "[s]ection 2543 permits a farmer who has originally set aside seed for replanting, but who no longer needs the seed because of a change in his or her planting plans, to sell it for use as a seed." United States' Br. at 11. While perhaps an interesting plot for a farm docudrama, there is not one single word in the statute or the legislative history which hints that the right to sell is limited to circumstances where there has been a change in plans. Even Petitioner concedes that a farmer could sell each year the amount it takes to replant his own crop for whatever reason.

[7] Petitioner's analysis of the statute is reminiscent of the sort of "structural analysis . . . discerning a significant hierarchy of . . . rights in the statutory scheme" which was rejected, in favor of a literal reading, by the Court in *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 573 (1991).

[8] Petitioner's Br. at 21 n.14; United States' Br. at 12 n.9. We should be mindful of the command "not to make a fortress of the

definitions they cite have any application to the saving of seed. All of the definitions of marketing relied on by Petitioner and the United States require buying or selling in a market, or the totality of activities involved in the transfer of goods from producer or seller to consumer or buyer. There is no buying or selling, or transfer of goods, when a farmer saves seed. Thus any amount of seed may be saved without running afoul of Section 2541(3), even accepting the definitions put forth by Petitioner and the United States.

It is noteworthy that an earlier version of the statute did limit the amount of seed which could be saved to that which could be grown for use by the farmer. The House Bill, H.R. 13631, contained a Section 112 which read as follows:

> Section 112. Right to Save Seed
>
> Except under subsections (3) and (4) of Section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969) reprinted in Plant Variety Protection, Hearing on H.R. 13424, etc. Before the Subcomm. on Departmental Operations of the House Comm. on Agriculture, 91st Cong., 2d Sess. (1970). That Section, which provides the limitations Petitioner now seeks, was not adopted and

dictionary." *Public Citizen v. U.S. Depart. of Justice*, 491 U.S. 452, 455 (1989), *citing Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir.), *aff'd*, 326 U.S. 404 (1945). There is no reason to believe that the particular nonlegislative sources chosen by these litigants are dispositive concerning the definition of marketing. A standard textbook in the area cites with approval the definition of marketing adopted by the American Marketing Association: "marketing is the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, and services to create exchanges that satisfy individual and organizational objectives." Berkowitz, Kerin and Rudelius, *Marketing* 7 (2d ed. 1989).

should not now be engrafted onto the statute through some marvel of statutory construction.[9]

The proposed limitations on the farmer's right to save seed must fail because keeping and storing sexually multiplied seed does not constitute marketing. Section 2541 (3) is only relevant when there is sexual multiplication of the protected seed in the context of marketing. Thus, if not limited by Section 2541(3), there can be no other limitation on the amount of seed which a farmer may save.[10] The contention that Section 2541(3) limits the saving of seed is the centerpiece of the arguments advanced by Petitioner and the United States, as *amicus curiae*. Once the essential fallacy of this proposition is recognized, there is no reason to engage in the fanciful and often tortured readings which are made of the statute.

A plain language reading does not render any portion of the statute superfluous. The retention of Section 2541 (3) in the opening clause of Section 2543 does not limit the amount of seed which can be saved, but rather denies the grower of protected seed an unfettered right to sell, through marketing, protected varieties. That right would otherwise exist due to the exemption from Section 2541 (1), the prohibition on selling, which is provided in the

[9] The fact that a provision incorporating the limitation advanced by Petitioner could easily have been written, was before Congress during the consideration of the legislation, and was not enacted is powerful evidence that Congress intended that there be no such limitation. *Federenko v. United States*, 449 U.S. 490, 512 (1981). As the Court said in a slightly different context in that case, it appears that the "real quarrel is with Congress, which drafted the statute. It is not the function of the courts to amend statutes under the guise of 'statutory construction.'" *Id.* at 514 n.35.

[10] The United States does concede that seed saving need not be limited to the amount of seed necessary to produce a crop of the same size in the immediately ensuing crop season. United States' Br. at 16 n.14. It notes that farmers often change the amount they plant from year-to-year and also that, as a matter of practice, farmers will set aside more than one year's supply of seed.

opening clause.[11] This right to sell *and* market is granted by language of the proviso only to qualified farmers, like the Winterboers. This reading of the opening clause comports with that canon of statutory construction which sets forth the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *U.S. v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *accord, Moskal v. United States*, 498 U.S. 103, 109-10 (1990).

C. There Is No Limitation On The Amount Of Saved Seed Which May Be Sold In A Qualifying Farmer-To-Farmer Transaction

The proviso found in Section 2543 removes the limitation on sales to other farmers which Section 2541(3)—the prohibition on sexually multiplying the protected variety as a step in marketing—would otherwise impose:

> *Provided*, That without regard to the provision of Section 2541(3) of this title, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale be in compliance with such State laws governing the sale of seed as may be applicable.

[11] It was necessary to provide an exemption from Section 2541(1) to allow the farmer-grower who had legally purchased the protected variety to do anything with the crop, as Section 2541(1) makes it an infringement to sell, offer, expose for sale, deliver, ship, consign, exchange, solicit an offer to buy or otherwise transfer title or possession of the protected variety. For many plants such as soybeans the seed is the crop. The retention of liability for infringement under Section 2541(3), which prohibits multiplication for marketing for growing purposes (rather than consumption), preserves those elements of Section 2541(1) which prohibit sales involving intensive marketing. The opening clause, by exempting "a person" from infringement liability to "use such saved seed . . . for sale as provided in this Section," allows such sales as do not involve marketing. Sales involving marketing are only allowed

7 U.S.C. § 2543. In a farmer-to-farmer sale the limitation on sexually multiplying the variety as part of *marketing* no longer applies. Nor does 7 U.S.C. § 2541(6), the limitation on reselling the variety without giving notice, apply. *See* Section III, *infra*. Thus, the farmer can produce the seed by sexual multiplication, sell it to another farmer, and need not give notice. The only limitation on such sale is that both the seller and the buyer be persons "whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes."

The Petitioner would read the statute as follows: in the first part of Section 2543, the retention of the Section 2541(3) prohibition limits the amount which the farmer can save to some precisely determinable limit related to replanting, and the proviso allows sales of only that amount. Petitioner's Br. at 25. As discussed at some length, *supra*, Section 2541(3) does not place any quantitative bound on the amount of seed which may be saved.

The Section-by-Section Explanation of S. 3070 in both the House and Senate reports accompanying passage provides strong evidence that the drafters intended no limitations on saving seed, nor any resultant limitation on "brown bagging." Interpreting the exact language enacted into statute as Section 2543, the explanation of Section 113 of S. 3070 states:

> Section 113. Right to Save Seed, Crop Exemption.—This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

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between qualifying farmers. Any other construction would render the right to sell afforded by the opening clause a nullity.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970). S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). No other section of the House or Senate reports addresses Section 113 of S. 3070.

The Explanation contains no suggestion of any limitation on the right to save seed. The right to save seed is "for future use *or* planting on the farm." [12] [Emphasis added] The disjunctive combination of "future use" and "planting" can only mean that the farmer may save seed for purposes other than planting on the farm. The report language is totally inconsistent with an interpretation which limits the right to save seed to the amount needed to plant the next year's crop. The right to sell "such saved seed" is similarly unfettered. The right can be availed of by any farmer whose "primary farming occupation is the growing of crops for other than reproductive purposes," so long as the saved seed is sold to another farmer similarly defined.

In summary, the right to market and sell saved seed in a farmer-to-farmer transaction is not subject to any quantitative limitation, except insofar as one is provided by the language in the proviso which limits the exemption from Section 2541(3) to persons "whose primary farming occupation is the growing of crops for other than reproductive purposes."

II. THE FEDERAL CIRCUIT ERRED IN HOLDING THAT ELIGIBILITY FOR A FARMER-TO-FARMER SALE MUST BE DETERMINED ON A CROP-BY-CROP BASIS

The PVPA does not provide a license for unlimited "brown bagging." The Federal Circuit correctly determined that the limitation did not come from restrictions on the right of the farmer to save seed. It further correctly determined that the language in the proviso allowing

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[12] It should be noted that neither "future use" nor "planting on the farm" is limited to what is needed for the next year's crop.

farmer-to-farmer sales only for farmers "whose primary farming occupation is the growing of crops for other than reproductive purposes" does limit the amount of "brown bagging" in which a farmer may engage.

However, the Court erred when it employed a test which examined the percentage of each novel variety a farmer was selling for seed, rather than looking to whether the farmer was predominately in the business of raising crops or selling seed:

> Indeed, the title of section 2543 is "crop exemption," not primary farming exemption. This title and the context of the Act show that the PVPA applies this crop exemption on a crop-by-crop basis (i.e. on "crops produced from a particular novel seed variety-by-crops produced from a particular novel seed variety" basis). The phrase "primary farming occupation is the growing of crops" applied to crops produced from a particular novel variety. Thus, buyers and sellers of brown bag seed qualify for the crop exemption only if they produce a larger crop from the protected seed for consumption (or other nonreproductive purposes) than for sale as seed.

Asgrow v. Winterboer, 982 F.2d 486, 490 (Fed. Cir. 1992).

The Federal Circuit court erred in holding that because Section 2543 is entitled "crop exemption" the primary farming occupation test must be applied on a crop-by-crop basis. Section 2543 covers two separate, though related, areas: the saving and sale of seed for growing purposes and the sale of seed as a crop. "Crop exemption" does not apply to sales of seed for reproductive purposes, but to the sale of seed as a crop. It was derived from Section 114 of H.R. 13631:

> Sec. 114. Crop Exemption
>
> It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.

H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969). This language, almost in the original form, is reproduced in Section 2543 subsequent to the language dealing with farmer-to-farmer sales. The provision regarding "crop exemption" was intended to deal with the situation where the seed was the crop, as with soybeans, not with the sale of seeds for reproduction. Because these seeds would not be sold in a farmer-to-farmer transaction, the marketing of such seeds would otherwise constitute an infringement. Section 112, as dramatically amended, and Section 114 of H.R. 13631 were combined in Section 113 of S. 3070 and both titles were combined in the caption. The resultant "crop exemption" refers only to sales of seed for nonreproductive purposes, which have no limit so long as they are made in the usual channels.

Sales of saved seed for reproductive purposes are not limited by a "crop exemption," but instead by the requirement that they be made between qualifying farmers meeting the "primary farming occupation" test. The use of the words "occupation" and "crops" in the statutory definition of that test is inconsistent with the crop-by-crop determination of status adopted by the Federal Circuit. It also comports with common sense to base eligibility on one's overall involvement with raising crops, rather than a specific crop. Neither a selling farmer nor a buying farmer is likely to know the crop-by-crop status of the other. They are far more likely to know whether, on the whole, the farmer they are dealing with is in the business of selling crops or selling seeds. Farmer-to-farmer sales of saved seed are permissible, as long as neither the selling farmer nor the buyer is in the seed business, but primarily makes his or her farming income from the sale of crops for consumption.

III. THE NOTICE PROVISION OF SECTION 2541(6) DOES NOT APPLY TO QUALIFYING SALES OF SAVED SEED BETWEEN FARMERS

The Court also granted certiorari on a second question involving the PVPA: whether those sales which are authorized under the farmer's exemption remain subject to Section 2541(6), which provides that it is an infringement of the rights of the owner of a protected variety to "dispense the novel variety, in a form which can be propagated, without notice as to being a protected variety under which it was received." 7 U.S.C. § 2541(6).

A cursory reading of the statute disposes of this matter. The opening clause of Section 2543 states that it does not infringe any right, other than those provided by Sections 2541(3) and (4), to save seed or sell saved seed. If the words of the opening clause are given their usual and ordinary meaning, Section 2541(6) does not, and can not, apply to the farmer's saving of seed or to the sale of saved seed to a qualified farmer. The United States, as *amicus curiae*, grudgingly reached this conclusion.

Petitioner argues that the proviso which adds yet another exemption to those already granted—the exemption from Section 2541(3) for farmer-to-farmer sales—somehow reinstates the applicability of Section 2541(6) and other exemptions granted in the opening clause.[13] Petitioner's Br. at 33-34. According to the Petitioner, one begins with the blanket statement in the opening clause of Section 2543 that "[e]xcept to the extent that such action may constitute an infringement under subsection (3) and (4) to Section 2541, it shall not infringe *any* right hereunder for a person to save seed . . . for sale," [emphasis added] which appears to exempt activity by

[13] In fact, Petitioner goes further and argues that "the other non-sale" acts listed in subsection (1) and all of the acts covered by subsections (2), (5), (7) and (8) of Section 2541 should remain applicable to sales under Section 2543. Petitioner's Br. at 33-34.

persons covered by Section 2543 from six of the eight subsections of Section 2541, then adds the specific proviso that farmer-to-farmer sales (a subset of sales enjoying that blanket freedom from other infringing acts) are additionally free from subsection (3) of Section 2541, a seventh subsection, and somehow ends up with the statutory reading that farmer-to-farmer sales are subject to subsections (1), (2), (4), (5), (6), (7) and (8) of Section 2541.[14] This "new math," by which six exemptions in the opening clause and an additional exemption from Section 2541(3) in the proviso add up to one exemption, rather than seven exemptions, is absurd. Whatever sales of saved seed are permitted by Section 2543 are also free from the notice requirement otherwise imposd by Section 2541(6).

IV. THE LIMITATION ON SEED COMPANIES' MONOPOLIZATION OF GENETIC RESOURCES EMBODIED IN THE FARMER'S EXEMPTION IS CONSISTENT WITH PUBLIC POLICY

Stripped of their meager legal support, the arguments of Petitioner and the *amici* bottom on policy considerations. The statute that Congress ought to have written, according to those urging reversal, should dramatically limit both saving seed and selling it to other farmers. While there is undoubtedly some merit in encouraging the development of new varieties of seed by offering to seed developers a patent-like protection, one can easily over-

[14] Petitioner states that "[t]he first sentence of Section 2543 can only properly be construed as providing a limited exemption from infringement solely with respect to those portions of Section 2541 that protect the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of Section 2541." Petitioner's Br. at 32. However, Petitioner fails to explain why, if Congress intended only to exempt growers of seed from subsection (1) of Section 2541 in the first sentence of Section 2543, it used the phrase "it shall not infringe any right" and provided six exemptions, not just an exemption from Section 2541(1).

state the importance of seed patents in achieving the goal of a healthy agricultural sector. This country did, after all, develop a robust and variegated agriculture and foster the "Green Revolution," the development of high-yielding wheat and rice varieties in the 1960s and 1970s that dramatically increased food production in the Third World, without a single seed patent.[15] The role of patent-holding seed breeders in achieving this diversity is minimal.[16]

Plant varieties are distinct from other kinds of "inventions" because no plant breeder starts from scratch in developing a new variety. Modern plant breeders, both public and private, build on the accumulated success and innovation of generations of farmers and breeders. Historically, U.S. farmers played a major role in contributing to the introduction and further development of exotic germplasm. America's farmers undertook countless "experiments" and, through mass selection, developed literally tens of thousands of novel plant varieties. It was the farmers' success in selecting and breeding these crops that helped to build the agricultural base of the United States. Farmer-bred and selected varieties became the backbone

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[15] Patents were available for asexually reproducing plants, which consist almost entirely of fruits and ornamental cultivars under the Plant Patent Act. Most grains and vegetables are sexually reproducing.

[16] *Hearings on H.R. 999 Before the Subcomm. on Department Investigations, Oversight and Research of the House Comm. on Agriculture*, 96th Cong., 2d Sess. 140 (Testimony of Kenneth Dahlberg). Dahlberg testified that 90% of all plant breeding has been done by nature itself and 9.9% by subsistence farmers.

It is important to recall that the seed breeding industry was not a product of the PVPA. Hundreds of seed breeders ran substantial businesses for more than a century prior to the PVPA. Companies such as Burpee, Pioneer and DeKalb were household names, active in every farm community, without patent protection. The importance of assuring uniform quality in farm seeds led, in 1912, to passage of the Federal Seed Law, which was replaced in 1939 by the Federal Seed Act, 7 U.S.C. §§ 1551 *et seq.*

of and raw material for the emergence of public and eventually private plant breeding programs.[17]

Advances in science and plant breeding techniques have cast a new light and a new value on genes. "Genetic erosion," the loss of genetic diversity through extinction, is an unintended consequence of modern plant breeding. To the extent that a breeder produces a successful variety, it can displace genetic material needed for future breeding programs. The loss of genetic diversity means the loss of valuable genes vital to a crop's ability to resist pests and diseases.[18] This transformation of a once abundant resource into a rare one raises the issue of how to guarantee access to the shrinking resource of genetic material, as well as the issue of who has the right to exercise control over this resource.

Seed saving and the swapping and selling of seeds between farmers make an important contribution to ensuring a diverse and robust gene pool for important crops. The construction of the PVPA sought by Petitioner will have a chilling effect on these practices. If farmers believe that saving or selling more than some unquantifiable amount of seed will subject them to infringement suits by multinational seed conglomerates, they are likely to cease the practice altogether.

Even with the farmer's exemption, the PVPA has resulted in tremendous consolidation within the seed industry with a resultant loss of options regarding not only genetic diversity but also farmers' choice. Whatever the causal link, there have been a large number of mergers and acquisitions in the U.S. seed industry since the pas-

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[17] C. Fowler, *Unnatural Selection: Technology, Politics, Law and the Rationalization of Plant Evolution*, Gordon and Breach Science Publishers, New York (forthcoming).

[18] C. Fowler and P. Mooney, *Shattering: Food, Politics and the Loss of Genetic Diversity* 82 (1990).

sage of PVPA.[19] Transnational pharmaceutical and agrochemical companies bought up hundreds of regional and family-owned seed companies. During the 1970s and 1980s, more than 500 family-owned seed firms were bought out by transnational corporations worldwide. The rise of the large corporate sector in controlling research and development for the future of agriculture has been accompanied by a precipitous decline in the public sector's role in this field. As a result, many old varieties have disappeared forever, displaced in the seed catalogues by a limited selection of new varieties sold as a package with herbicides and fertilizers. Adoption of the severe limitation on the farmer's exemption sought by Asgrow would exacerbate these disturbing trends.

Not only has the PVPA resulted in a loss of genetic diversity, but it has also resulted in a loss of farmers' choice, a loss which would be exacerbated if Asgrow's narrowing of the farmer's exemption is adopted. Because food production is an economic field vital to human survival, this loss of choice not only affects farmers but society as a whole. The PVPA has resulted in farmers having fewer choices of seed to select from, and having to pay significantly higher prices for those seeds that are available. Asgrow's proffered narrowing of the farmer's exemption would enable the seed industry to dictate to farmers how they dispose of their harvest.

Should farmers lose the right to save, swap or sell proprietary seed with farmer neighbors, they will have no choice but to return year after year to the seed companies for seed. Farmers would essentially become mere renters of germplasm, which would create, in effect, a new form of sharecropping. Concomitantly, adoption of Asgrow's narrow interpretation of the farmer's exemption would also foster greater concentration in the ownership and control of germplasm by transnational seed and agrochemical corporations. Not only would this entail an

[19] J. Doyle, *Altered Harvest* 432-76 (1985).

increase in the cost of seed to farmers,[20] but it would also entail surrender of the farmers' ability to decide what crops they wish to plant. The farmer's exemption acts as a partial brake on this concentration of power over germplasm resources by seed companies.

This Court's interpretation of the farmer's exemption is of central importance in the ongoing struggle over who will control the food supply of the nation and the world. Until recently, control over the food supply has been disbursed among a multitude of farmers; now, however, seed developers seek to subjugate the rights of farmers in favor of large corporate interests. Congress refused to enact a version of the PVPA which rigidly limited seed saving and banned farmer-to-farmer seed sales. This Court should uphold the intent of Congress and affirm the right of farmers embodied in the farmer's exemption to save, sell, and swap seed.

CONCLUSION

Twenty-five years ago, a House subcommittee recommended passage of H.R. 13631, a plant protection act which had the enthusiastic backing of the seed industry. That bill contained a strict limitation on seed saving and did not allow farmer-to-farmer sales of protected varieties. These provisions were never enacted: they were never even brought up for a vote. The issues of statutory construction raised by the Petitioner can be resolved simply and without resort to statutory gymnastics. The PVPA has never contained a quantitative restriction on the right of farmers to save seed. Nor has it ever contained a quantitative limitation on the right of farmers to sell that seed to other farmers.

In both 1970, when the PVPA was enacted, and in 1980, when it was amended, the seed breeding industry

[20] It is a matter of general knowledge that seeds are more expensive in Europe where farmers are not allowed to save seed but must repurchase year after year.

had an opportunity to convince Congress of the wisdom of severe restrictions on the right to save seed and the right of farmers to sell saved seed to other farmers. It failed both times. On a matter fraught with such important consequences for agricultural development and the relationship between farmers and suppliers, the seed industry should not be permitted to win in the courtroom what it has failed to secure through the legislative process.

Respectfully submitted,

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